RECORD AND BRIEFS

No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., and JACK. C. PHILLIPS,

Petitioners,

—v.—

COLORADO CIVIL RIGHTS COMMISSION, CHARLIE CRAIG, and DAVID MULLINS,

Respondents.

ON WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF FOR RESPONDENTS CHARLIE CRAIG AND DAVID MULLINS

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QUESTIONS PRESENTED

1. Whether the Free Speech Clause permits a business to discriminate in making sales to the public in violation of a regulation of commercial conduct that does not target speech?

2. Whether the Free Exercise Clause permits a business to discriminate in making sales to the public in violation of a state law that is neutral and generally applicable?

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INTRODUCTION

Five years ago, David Mullins and Charlie Craig were planning their wedding. When they visited Masterpiece Cakeshop (the "Bakery") to inquire about a cake for their reception, what should have been a happy occasion became a humiliating one. Before Mr. Mullins and Mr. Craig could even begin to discuss what kind of cake they would like, the Bakery's owner made clear that he would bake no cake for their wedding reception because he objects to same-sex unions. The Bakery has repeatedly refused to provide any baked goods—even cupcakes—for wedding receptions or commitment ceremonies of same-sex couples.

The Bakery's actions violated Colorado's Anti-Discrimination Act, a civil rights statute whose origins date to 1885. Like the public accommodation laws of nearly every state in the Union, the Anti-Discrimination Act bars businesses that are open to the public from refusing service based on certain aspects of a person's identity—including, in Colorado, their sexual orientation. While many citizens take for granted equal access to goods and services in the commercial marketplace, members of minority groups often cannot. For those who are lesbian, gay, bisexual, or transgender ("LGBT"), these laws ensure equal opportunity to participate in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). This Court has recognized our country's long and painful history of discrimination against LGBT people. Well into the twentieth century, "[g]ays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and

burdened in their rights to associate." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

There is no question that Colorado has the authority to prohibit discrimination in sales by businesses that choose to operate in the State. The Bakery argues, however, that because its cakes are "expressive," and because its owner objects to marriage for same-sex couples on religious grounds, the First Amendment exempts it from Colorado's requirement that all businesses treat heterosexual and LGBT customers equally. In essence, the Bakery seeks a constitutional right to hang a sign in its shop window proclaiming "Wedding Cakes for Heterosexuals Only."

This is not the first time a business open to the public has sought to avoid an anti-discrimination law by invoking the First Amendment. In every prior case, this Court has rejected such claims, whether framed as involving the freedom of expression, association, or religion. Discriminatory conduct by business entities "'has never been accorded affirmative constitutional protections.'" *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)); *see also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-60 (1964).

While the particular facts of this case involve a bakery refusing to sell a cake for the wedding reception of a same-sex couple, the implications of the Bakery's (and the United States') arguments are not limited to sexual orientation discrimination or weddings. If the First Amendment bars a state from applying an anti-discrimination law to the sale of

wedding cakes because they involve artistry, then bakeries could refuse to provide cakes for an interracial or interfaith couple's wedding, a Jewish boy's bar mitzvah, an African-American child's birthday, or a woman's business school graduation party. And, because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), a wide range of businesses could claim a First Amendment exemption from generally applicable regulations of commercial conduct. The Bakery's free exercise claim presents the same problem. There is no doubt that the Bakery owner's religious objections are sincere, but granting such a religious-based exemption would allow every business owner "to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

As the Supreme Court of Nebraska explained in one of the earliest public accommodation decisions:

> A barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one: "You are a slave, or a son of a slave; therefore I will not shave you."

Messenger v. State, 41 N.W. 638, 639 (Neb. 1889). To recognize either of the Bakery's asserted First Amendment objections would run counter to the basic principle, reflected in over a century of public accommodation laws, that all people, regardless of status, should be able to receive equal service in American commercial life.

STATEMENT OF THE CASE

A. Factual Background.

In 2012, Mr. Mullins and Mr. Craig decided to get married. It was not yet possible for them to marry in Colorado, where they lived, so they planned two events: a wedding ceremony in Massachusetts and a reception in Colorado at a later date. Pet. App. 5a. On the recommendation of their reception planner, Mr. Mullins and Mr. Craig visited the Bakery—a Colorado corporation that sells baked goods to the public at large—to discuss a cake for their Colorado event. JA 71, 80, 88, 95, 190-91.

The couple and Mr. Craig's mother, Deborah Munn, sat down with Jack Phillips, the Bakery's owner. JA 38; Pet. App. 64a. As soon as they explained that they were interested in buying a cake for their wedding reception, Mr. Phillips told the couple that, while the Bakery would sell baked goods to gay and lesbian customers for other purposes, it would not sell them baked goods for weddings. Pet. App. 64a-65a. Because the Bakery refused to provide any cake, there was no discussion of what kind of cake the couple wanted. Pet. App. 65a.

The next morning, Ms. Munn called the Bakery to ask Mr. Phillips why he had refused to sell her son a cake. JA 39. Mr. Phillips said that the Bakery's policy of refusing to provide baked goods for weddings of same-sex couples was based on his Christian religious beliefs. *Id.*

Mr. Mullins and Mr. Craig were not the first same-sex couple the Bakery had turned away. In fact, it had refused service to at least five other same-sex couples who sought baked goods for their

wedding receptions or commitment ceremonies. JA 113-22, 167. One of those couples had asked about placing an order for cupcakes, but when the Bakery representative learned that the cupcakes were for their commitment ceremony, the Bakery refused. JA 73, 113-14. Mr. Phillips told another couple that "he is not willing to make a cake for a same-sex commitment ceremony, just as he would not be willing to make a pedophile cake." JA 75, 120-22.

B. Colorado Anti-Discrimination Act.

"[F]or well over 100 years, Colorado has prohibited discrimination by businesses that offer goods and services to the public." Pet. App. 68a. Colorado was among the first states to codify the common law duty not to "refus[e], without good reason, to serve a customer." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 571 (1995); *see also Romer*, 517 U.S. at 628 (describing history of Colorado's anti-discrimination laws). The earliest predecessor to the Anti-Discrimination Act, entitled "An Act To Protect All Citizens in Their Civil Rights," became law in 1885. Act of Apr. 4, 1885, 1885 Colo. Sess. Laws 132. It guaranteed all citizens the "full and equal enjoyment" of places of public accommodation regardless of race, color, or previous condition of servitude. *Id.* at 132-33; *see also Darius v. Apostolos*, 190 P. 510, 510 (Colo. 1919) (interpreting 1895 version of the Act).

In the mid-20th century, Colorado, like many states, expanded the types of businesses covered by the statute. Act of June 7, 1969, ch. 74, 1969 Colo. Sess. Laws 200 § 1. Today, the Anti-Discrimination Act defines "place of public accommodation" to

include, as relevant here, "any place of business engaged in any sales to the public and . . . any business offering wholesale or retail sales to the public." Colo. Rev. Stat. § 24-34-601(1). It specifically exempts churches, synagogues, mosques, or other places principally used for religious purposes. *Id.*

In 2008, Colorado added sexual orientation to disability, race, creed, color, sex, marital status, national origin, and ancestry as an expressly prohibited basis for refusing service. Act of May 29, 2008, ch. 341, 2008 Colo. Sess. Laws 1593 § 6. The purpose of the amendment was to cure the particular history of discrimination against LGBT people in Colorado so that they might "live in dignity" and "die in dignity" in the State. *An Act Concerning the Expansion of Prohibitions on Discrimination: Hearing on S.B. 08-200 Before the H. Comm. on the Judiciary*, 66 Gen. Assem. 2d Reg. Sess. (Colo. 2008) (statement of Rep. Joel Judd); *see generally* Br. of Colo. Orgs. & Individuals in Supp. of Resp'ts § I.

Twenty other states and the District of Columbia likewise expressly prohibit places of public accommodation from discriminating on the basis of sexual orientation.[1] Many more, as well as the federal government, prohibit discrimination by places of public accommodation based on characteristics such as race, religion, national origin, and disability. *See, e.g.*, 42 U.S.C. § 2000a; 42 U.S.C. § 12182; *see generally* Br. Amicus Curiae of Public Accommodation Law Scholars § I.

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[1] *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES (July 13, 2016), https://perma.cc/86NK-4684.

C. Proceedings Below.

Mr. Mullins and Mr. Craig filed charges of discrimination with the Colorado Civil Rights Division ("Division"), alleging that the Bakery had denied them full and equal enjoyment of a place of public accommodation because of their sexual orientation. JA 31-52; *see* Colo. Rev. Stat. § 24-34-601(2).

After an investigation, the Division made several factual findings. It found that the Bakery had turned away the couple because they wanted to order a cake for their wedding reception, that the Bakery had a "standard business practice" of refusing to sell "wedding cakes to same-sex couples," and that it had turned away five or six couples in the past for that reason. JA 72-73, 76, 85. The Division also found that the Bakery provides baked goods, including wedding cakes, to the public and that it did not claim to be a business principally operated for religious purposes. JA 71, 72, 80, 81. Based on these findings, the Division concluded there was probable cause to believe that the Bakery had discriminated against Mr. Mullins and Mr. Craig because of their sexual orientation. JA 76, 85.

After attempts to settle the charges were unsuccessful, the Colorado Civil Rights Commission ("Commission") filed formal complaints against the Bakery with the Colorado Office of Administrative Courts. JA 87-100. Mr. Mullins and Mr. Craig intervened. JA 101-03.

The Administrative Law Judge ("ALJ") granted summary judgment against the Bakery, finding that it had discriminated against Mr. Mullins and Mr. Craig because of their sexual orientation in

violation of the Anti-Discrimination Act. Pet. App. 61a-88a. The ALJ rejected the Bakery's contention that it did not discriminate on the basis of sexual orientation because it was willing to sell baked goods to LGBT people for other occasions. The ALJ reasoned that "[i]f [the Bakery's] argument was correct, it would allow a business that served all races to nonetheless refuse to serve an interracial couple because of the business owner's bias against interracial marriage." Pet. App. 71a. The ALJ also concluded that the First Amendment did not authorize the Bakery to discriminate in sales to the general public. Pet. App. 87a.

The Bakery appealed to the Commission. After a public hearing, the Commission adopted the ALJ's opinion in full. Pet. App. 57a. The Commission issued a remedial order directing the Bakery to "cease and desist from discriminating against [Mr. Mullins and Mr. Craig] and other same-sex couples by refusing to sell them wedding cakes or any product [the Bakery] would sell to heterosexual couples." *Id.* To ensure compliance with this remedy, the order also directed the Bakery to train its staff regarding the Anti-Discrimination Act's requirements and to provide quarterly compliance reports to the Commission for two years. Pet. App. 58a.

The Colorado Court of Appeals unanimously affirmed. Pet. App. 1a-53a. It found that the Bakery discriminated because of sexual orientation under state law and rejected the Bakery's defense that it did not discriminate because it was willing "to sell birthday cakes, cookies, and other non-wedding cake products to gay and lesbian customers." Pet. App. 13a, 19a. It reasoned that even assuming the Bakery would sell other products for other events to LGBT

people, the Anti-Discrimination Act required it to offer them any goods and services that it "otherwise offers to the general public." Pet. App. 19a.

The court also concluded that application of the Anti-Discrimination Act did not infringe the Bakery's freedom of speech or free exercise of religion. As to the free speech claim, the court held that requiring the Bakery not to discriminate against potential customers did not require it to convey any message of support for same-sex marriage. Pet. App. 22a. It noted that the Bakery was "free to disassociate itself from its customer's viewpoints" by, for example, "posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement." Pet. App. 35a.

The court also rejected the Bakery's free exercise claim, reasoning that the Anti-Discrimination Act is a neutral law of general applicability and, as a result, is subject to rational basis review. Pet. App. 49a. The court "easily conclude[d]" that the Anti-Discrimination Act satisfies that standard because it "prevents the economic and social balkanization prevalent when businesses decide to serve only their own 'kind.'" Pet. App. 49a-50a.

The Colorado Supreme Court denied review. Pet. App. 54a-55a.

SUMMARY OF ARGUMENT

I. This case involves the straightforward application of a standard public accommodation law. The Anti-Discrimination Act applies to businesses that choose to serve the public at large and requires that once they offer a product, they not refuse service based on enumerated personal characteristics, including race, religion, and sexual orientation. It is equivalent to anti-discrimination statutes this Court has upheld repeatedly against challenges rooted in First Amendment rights of expression, association, and religion.

II.A. Whether wedding cakes are artistic expression is not the issue here. The question, rather, is whether the Constitution grants businesses open to the public the right to violate laws against discrimination in the commercial marketplace if the business happens to sell an artistic product. Under this Court's precedent, the answer to that question is no.

The State's prohibition against discrimination in the sale of goods and services to the public is a regulation of commercial conduct that affects expression only incidentally. This Court has uniformly rejected First Amendment defenses to discrimination lodged by commercial entities that provide expressive goods or services, including law firms and private schools, with minimal scrutiny. Businesses, the court has held, have "no constitutional right . . . to discriminate." *Hishon*, 467 U.S. at 78.

Even outside the commercial setting, when a government regulation of conduct incidentally affects expression, the Court has applied at most deferential

scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968), and has uniformly upheld regulations under that standard.

The Bakery's attempt to invoke strict scrutiny by arguing that the Anti-Discrimination Act is content- and viewpoint-based fails. The Anti-Discrimination Act prohibits discrimination in sales without regard to the content of any particular product or service, and Colorado has applied it in a content- and viewpoint-neutral manner.

II.B. The Bakery's compelled speech argument likewise does not trigger strict scrutiny. The Anti-Discrimination Act does not compel the Bakery to speak any state-selected message or host any state-selected speaker. *Hurley*, the case on which the Bakery and the United States principally rely, has no application here: The law in *Hurley* was applied not to commercial conduct, but to a private, expressive parade. The law's "peculiar application" did not regulate conduct with only an incidental effect on expression, but directly regulated nothing *but* expression—the content of the private parade's message. The application of the Anti-Discrimination Act, by contrast, is entirely routine, regulates the conduct of commercial sales, and is content-neutral.

II.C. Whether the Court applies the minimal scrutiny appropriate for regulations of commercial conduct that incidentally affect expression or the standard set forth in *O'Brien*, the Anti-Discrimination Act's application to the Bakery is constitutional. Neither the Bakery nor the United States even argues that the law fails either form of scrutiny. The Anti-Discrimination Act furthers the State's substantial interest in eradicating

discrimination, an interest that is "unrelated to the suppression of expression," *O'Brien*, 391 U.S. at 377, and that interest would be achieved less effectively if "expressive" businesses were allowed to discriminate. Indeed, the Anti-Discrimination Act would survive even strict scrutiny, because it is precisely tailored to serve not just an important, but a compelling government interest in ending discrimination by commercial establishments open to the public.

II.D. The Bakery's (and the United States') attempts to limit their requested exemptions to "expressive" products and "expressive" events are unsupported in this record, foreclosed by precedent, and boundless in practice. Either requested exemption would mean bakeries could refuse to provide not just wedding cakes for gay couples, interracial couples, or interfaith couples, but birthday cakes for African-American families, graduation cakes for women, and cupcakes for a Catholic family celebrating a First Communion. And both theories would mean that numerous other businesses could claim exemptions from anti-discrimination laws and other regulations of commercial conduct. For the same reasons that the Court has declined to interpret the Free Exercise Clause to make every man "a law unto himself," *Reynolds*, 98 U.S. at 167, this Court should decline the Bakery's and the United States' invitation to achieve the same result under the Free Speech Clause.

III.A. The Bakery's free exercise claim likewise fails. The Bakery does not even attempt to argue that the Anti-Discrimination Act is not valid or neutral on its face, and its as-applied challenge rests largely on the same failed arguments it offers in

support of its free speech claim.

III.B. The Anti-Discrimination Act is also generally applicable. An anti-discrimination law that governs all retail businesses open to the public does not target religious exercise.

III.C. The Bakery's assertion that strict scrutiny is required because it asserts a "hybrid" free exercise/free speech claim lacks any support in precedent or reason. An otherwise unsuccessful free exercise claim cannot avoid rational basis review simply by being paired with an otherwise unsuccessful free speech claim.

ARGUMENT

I. THIS CASE INVOLVES A STRAIGHTFORWARD APPLICATION OF AN ANTI-DISCRIMINATION LAW TO COMMERCIAL SALES.

This is a routine application of a standard public accommodation law. Like virtually all public accommodation laws, Colorado's Anti-Discrimination Act applies to businesses that are open to the public. It regulates their sales by prohibiting them from refusing to serve a customer based on certain personal characteristics—specifically, disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry. Colo. Rev. Stat. § 24-34-601(1), (2). Its prohibition on discrimination in sales is entirely indifferent to whether the product being sold is artistic or expressive; it applies equally to sales of coffee cups or jewelry, to admissions to hotels or theaters, and to services provided by gas stations or sign painters. The Anti-Discrimination Act is also indifferent to any message the business

seeks to communicate—or not communicate—by refusing service to customers on the prohibited grounds. If a business denies service to a customer because she is Catholic, or African American, or gay, it does not matter whether the refusal was motivated by a religious belief, a desire to express a particular message, or bare animus.

The Commission's application of the Anti-Discrimination Act in this case was also straightforward. It found that the Bakery discriminated on the basis of sexual orientation because it refused to sell a product to a gay couple that it would have (and previously had) sold to heterosexual couples. Moreover, the remedy it imposed does not affect the Bakery's artistic choices in preparing cakes. It simply requires that if the Bakery chooses to sell wedding cakes to heterosexual couples, it must not refuse to sell the same product to gay couples.

The Bakery is not the first business to claim a First Amendment right to violate an anti-discrimination law because of its sincerely held religious or moral beliefs. This Court has never accepted that premise, and has, instead, affirmed repeatedly the government's ability to prohibit discriminatory conduct over the freedom of expression, association, and religion objections of entities ranging from law firms, *Hishon*, 467 U.S. at 78, and labor unions, *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945); to private schools, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976), and universities, *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983); to membership organizations open to the public, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); to restaurants,

Piggie Park, 390 U.S. at 402 n.5, and newspapers, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973). Retail bakeries should fare no differently. "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring).

II. THE FIRST AMENDMENT'S FREE SPEECH CLAUSE DOES NOT AUTHORIZE A BUSINESS TO ENGAGE IN DISCRIMINATION PROHIBITED BY A REGULATION OF CONDUCT THAT INCIDENTALLY AFFECTS EXPRESSION.

A. Colorado's Law Regulates Commercial Conduct and Affects Expression Only Incidentally, and Is Therefore Subject at Most to Deferential Review.

When confronted with claims that a regulation of conduct affects speech in some manner, the Court has applied two separate, but related, lines of analysis. Central to both lines is the same core concept: If the law aims to regulate conduct *regardless* of what it communicates, the law does not violate the First Amendment. Where the law is a regulation of commercial conduct, the Court has upheld the law, applying minimal scrutiny even if the regulation of conduct has an incidental effect on speech. § II.A.1. Outside the commercial context, the

Court has applied the test set forth in *O'Brien* to determine whether regulation of expressive conduct violates the Constitution. § II.A.2. Whether the Anti-Discrimination Act is evaluated under the commercial conduct cases or *O'Brien*, the result is the same: The law is a permissible regulation of conduct that does not violate the First Amendment. The Bakery's attempt to invoke strict scrutiny by claiming that the Anti-Discrimination Act is "content-based and viewpoint-based," Pet. Br. 35, fails. § II.A.3.

1. Generally applicable laws that regulate commercial conduct and do not target speech receive minimal First Amendment scrutiny.

This Court has never before recognized what the Bakery seeks here: a First Amendment exemption for a business from a generally applicable regulation of commercial conduct. Every time a business has requested a First Amendment exemption to such a law—including laws barring discrimination in sales, service, and employment—the Court has dismissed the First Amendment objection and upheld the law with minimal or no apparent scrutiny.

As an initial matter, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)

("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.").

Moreover, the First Amendment is not infringed when the government enforces a generally applicable regulation of commercial conduct against a business that is "expressive." Even newspaper publishers, whose very product is protected speech, can be subject "to generally applicable economic regulations," including the antitrust laws and the Fair Labor Standards Act, without implicating the First Amendment. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). "The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." *Associated Press v. United States*, 326 U.S. 1, 7 (1945); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937); *see also Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139-40 (1969) (no First Amendment immunity from antitrust laws); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 192 (1946) (no First Amendment immunity from Fair Labor Standards Act). In contrast, a law specifically requiring a newspaper to print particular content (or forbidding it from printing such content) directly intrudes on the First Amendment. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Like other regulations of commercial conduct, anti-discrimination laws may incidentally affect a business's speech or expression without running afoul of the First Amendment. As this Court explained in *Rumsfeld v. Forum for Academic &*

Institutional Rights, Inc., 547 U.S. 47, 62 (2006) ("*FAIR*"), Congress "can prohibit employers from discriminating on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."

This Court has thus uniformly rejected businesses' challenges to generally applicable laws barring discrimination, even where those businesses dealt in expressive goods or services. For example, in *Hishon*, a law firm argued that applying Title VII to require it to consider a woman for partnership "would infringe [its] constitutional rights of expression or association." 467 U.S. at 78. Although a law firm's work product constitutes "speech," *see, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001), the *Hishon* Court dismissed the law firm's First Amendment claim, holding that there is "no constitutional right . . . to discriminate." 467 U.S. at 78. By contrast, a law that specifically targeted a law firm's speech by, for example, preventing it from bringing cases that "challenge existing welfare law[s]," would "implicat[e] central First Amendment problems." *See, e.g.*, *Velazquez*, 531 U.S. at 537, 547-48.

In *Runyon*, a private school, which was "commercially operated" and "advertised and offered [its educational services] to members of the general public," argued that its First Amendment right of expressive association permitted it to refuse admission to African-American students. 427 U.S. at 168, 172, 175. The Court held that while "'[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by

the First Amendment . . . it has never been accorded affirmative constitutional protections'" and dismissed the challenge. *Id.* at 176 (alterations in original) (quoting *Norwood*, 413 U.S. at 470). Had the State instead passed a law directly targeting a private educational institution's speech by prohibiting it from teaching (or requiring it to teach) "the belief that racial segregation is desirable," that would have raised serious First Amendment concerns. *Id.*

Under this line of precedent, even if wedding cakes constitute "artistic expression" protected by the First Amendment, Pet. Br. 17-18, that does not mean any regulation of bakeries that make wedding cakes violates the First Amendment. The Bakery likens its cakes to tattoos, custom-painted clothing, stained glass windows, and video games. Pet. Br. 18-19. But businesses that provide these products to the public at large are just as subject to generally applicable regulations of their commercial conduct as newspapers and law firms. A video game business cannot claim an exemption from the Fair Labor Standards Act to allow it to hire child laborers, and a tattoo parlor cannot claim an exemption from a general health code regulation governing the disposal of needles, simply because video games and tattoos are artistic expression protected by the First Amendment. Nor are such businesses exempt from anti-discrimination laws.

The Bakery's far-fetched appeals to the work of Jackson Pollock and Piet Mondrian, Pet. Br. 18, 20-21, are equally misguided. Individual artists do not generally operate as a "place of business engaged in . . . wholesale or retail sales to the public," and therefore would not be subject to Colorado's Anti-Discrimination Act. Colo. Rev. Stat. § 24-34-601(1).

However, when they do open businesses that serve the general public, artists are not immune from anti-discrimination laws in selling their art. If Jackson Pollock had operated a retail store in Colorado offering paintings to the public, he too would have been subject to the Anti-Discrimination Act and could not have discriminated in sales to the public based on customers' race, religion, sexual orientation, or other enumerated characteristics. *Cf. Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 (N.M. 2013). The critical factor in whether a public accommodation law applies is whether a business chooses to sell to the general public, not whether it creates "great[] masterpieces" or charges "significant sums." Pet. Br. 20.

In short, this Court's precedents establish that generally applicable regulations of commercial conduct that incidentally affect speech do not violate the First Amendment. Thus, even if the creation of some wedding cakes involves "artistic expression," Pet. Br. 17-18, that "hardly means" that any regulation of bakeries that make wedding cakes "should be analyzed as one regulating the [Bakery's] speech rather than conduct." *FAIR*, 547 U.S. at 62. If the Anti-Discrimination Act targeted the expressive aspects of cakes by regulating their design or the inscriptions on them, as such, it could run into the same problems as the laws in *Velazquez* and *Tornillo*. But it does no such thing; it regulates sales.

Because the Anti-Discrimination Act regulates the conduct of sales regardless of whether the service in question involves speech or expression, it does not violate the First Amendment.

2. Outside of the commercial context, generally applicable laws that target conduct, not speech, are governed by *O'Brien*.

Even outside the commercial context at issue here, regulations of conduct that are "unrelated to the suppression of free expression" are at most subject to scrutiny under *O'Brien*. 391 U.S. at 377. Under *O'Brien* and its progeny, a regulation of conduct that is "unrelated to the suppression of expression" satisfies First Amendment scrutiny, even as applied to cases where the conduct is expressive, if it furthers "'a substantial government interest that would be achieved less effectively absent the regulation.'" *FAIR*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)); *O'Brien*, 391 U.S. at 376 ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms."). The critical inquiry is whether the government seeks to regulate conduct *because* of what it communicates, or *regardless* of what it communicates. *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989).

Here, the Anti-Discrimination Act regulates conduct (discrimination in sales) regardless of whether, or what, it communicates. It forbids a restaurant from refusing to seat African-American families, regardless of whether the refusal is based on the restaurant's sincere belief that racial integration is a sin or that seating African-American and white families together expresses support for

racial integration. *Cf. Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) (rejecting the argument that a restaurant owner "has a constitutional right to refuse to serve members of the Negro race in his business establishments"), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

As this Court recognized in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 n.7 (1984), the government is free to enforce generally applicable regulations of conduct "even against people who choose to violate [those] regulations for expressive purposes." *See also Albertini*, 472 U.S. at 687-88. In *Clark*, the Court upheld the application of a federal rule barring sleeping in national parks against a non-profit group that sought to sleep overnight in Washington, DC's Lafayette Park to protest the plight of the homeless. 468 U.S. at 291-92. The Court acknowledged that the protesters sought to engage in overnight camping for expressive purposes, but it concluded that the Park Service's interest in "limit[ing] the wear and tear on park properties" was "unrelated to the suppression of expression," *id.* at 299, and therefore subject only to *O'Brien* scrutiny, which it satisfied. *Id.* at 298.

And in *O'Brien* itself, the defendant was undeniably engaged in expression when he burned his draft card on the steps of a Boston courthouse to protest the draft and the Vietnam War. 391 U.S. at 376. This Court nonetheless found that because the government's interest in preserving draft cards was "unrelated to the suppression of expression," *id.* at 377, his conviction for draft card destruction did not violate the First Amendment. *Id.* at 381-82.

The same is true here. The Anti-Discrimination Act regulates sales to the public without regard to expression; it prohibits discrimination in sales whether a business wants to send a message or not, and regardless of whether a product or service is itself artistic or creative or contains any message. This Court has already held that "eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . is unrelated to the suppression of expression." *Roberts*, 468 U.S. at 624. Accordingly, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

As such, the Anti-Discrimination Act is subject, at most, to *O'Brien* scrutiny. Neither the Bakery nor the United States even argues that the Anti-Discrimination Act fails *O'Brien*, Pet. Br. 48; U.S. Br. 23, and as shown below in § II.C, it does not.

3. The Anti-Discrimination Act is not content- or viewpoint-based, so there is no basis for applying strict scrutiny.

Seeking to avoid *O'Brien* or the minimal scrutiny this Court has applied to generally applicable regulations of commercial conduct, the Bakery argues that strict scrutiny should apply because the Anti-Discrimination Act is content- and viewpoint-based. Pet. Br. 35-37.

But "federal and state anti-discrimination laws" are "an example of a permissible *content-neutral regulation of conduct*." *Wisconsin v. Mitchell*,

508 U.S. 476, 487 (1993) (emphasis added). As this Court explained in *Hurley*, public accommodation laws do not, on their face, "target speech or discriminate on the basis of its content, the focal point of [their] prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." 515 U.S. at 572; *see also Duarte*, 481 U.S. at 549 (public accommodation laws "make[] no distinctions on the basis of [an] organization's viewpoint"). Even the United States concedes that the Anti-Discrimination Act is content-neutral and that "[p]ublic accommodations laws generally do not regulate the content of expression but rather the discriminatory provision of goods and services—an act that is not itself protected under the First Amendment's Free Speech Clause." U.S. Br. 13.

The Bakery nonetheless contends that the Anti-Discrimination Act is content-based because it applies only to certain "topics," such as marriage for same-sex couples. Pet. Br. 35. That is false. The Anti-Discrimination Act is triggered not by the "topic" of marriage for same-sex couples, or by any topic at all, but by refusals of service based on identity (disability, race, creed, color, sex, sexual orientation, marital status, national origin, and ancestry). Strict scrutiny would apply if the government passed a law prohibiting bakeries from selling cakes in the shape of crosses or cakes bearing words criticizing the President. It does not apply when the government requires a bakery not to discriminate against members of the public in retail sales. The Bakery's argument would invalidate not only Colorado's Anti-Discrimination Act, but all such laws.

The Bakery also argues that the Anti-Discrimination Act "favors" businesses that support marriage for same-sex couples over those that do not, and therefore is viewpoint-based. Pet. Br. 36. But it does nothing of the kind. It prohibits refusing sales on grounds of customers' sexual orientation, regardless of a business's views on marriage or any other subject. Under the Anti-Discrimination Act, it is just as unlawful to refuse to sell a wedding cake because a couple is heterosexual as it is to refuse to sell a wedding cake because the couple is gay.

The Bakery maintains that the Anti-Discrimination Act has been applied in a viewpoint-discriminatory manner because the Division found no discrimination in connection with three charges filed against three different bakeries while this case was pending. *Id.* (citing Pet. App. 20a n.8; JA 230-58). In those cases, a man named William Jack alleged that three bakeries discriminated against him because of his Christian religion by refusing to fill his orders for cakes bearing derogatory messages about gay people. Pet. App. 297a-325a. The Division investigated each of Mr. Jack's allegations and determined that none of the bakeries discriminated against him because of his religion. Instead, it found, the bakeries declined to produce the cakes, not because of Mr. Jack's religious identity, but because they objected to the requested "derogatory language and imagery." Pet. App. 297a-298a, 305a, 307a, 313a-314a, 316a, 323a-324a. Because the bakeries would have refused to produce the cakes Mr. Jack requested for anyone—whether Christian, Muslim, agnostic, or atheist—the Division found that they did not discriminate against Mr. Jack "because of" his religion. That is a correct

application of the statute, and does not in any way turn on viewpoint.

The Anti-Discrimination Act does not prohibit businesses from adopting policies that apply equally to all customers (for example, "We won't write this message for anyone"). It simply prohibits refusing service because of a customer's protected characteristic ("We'll sell this cake to anyone except Mormons"). The Division's findings of no probable cause, therefore, do not establish that the Division disfavors Mr. Jack's religion or the particular messages that he requested, but only that it found no evidence of prohibited identity-based discrimination.[2]

Finally, the Bakery's assertion that its decision whether or not to sell a cake turns not "on who the customer is, but on what the custom cake will express or celebrate," Pet. Br. 1 (emphasis omitted), is contradicted by the record. The Bakery objected not to anything particular about the cake's design or any proposed inscription.[3] Nor did it object

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[2] The same is true of the ALJ's explanation that a "black baker could . . . refuse to make a cake bearing a white-supremacist message for a member of the Aryan Nation; and an Islamic baker could . . . refuse to make a cake denigrating the Koran for the Westboro Baptist Church." Pet. App. 78a. The ALJ's point was that neither example involves discrimination on the basis of a characteristic protected by the Anti-Discrimination Act. Therefore, Colorado law does not regulate the Bakery's choice to refuse to sell Halloween-themed baked goods to anyone. If, by contrast, the Bakery refused to make a cake bearing a particular message for a white customer but agreed to make the same cake for an African-American customer, then the Anti-Discrimination Act would apply, because that would be race-based discrimination.

[3] The Bakery's suggestion that Mr. Mullins and Mr. Craig "intended to ask Mr. Phillips to design 'a rainbow-layered

to serving weddings. Rather, it objected to *who* would be using the cake. A bakery that refused to provide cakes for the weddings of interracial or Jewish couples would be discriminating based on race or religion, even if it said it did so because it disapproved of those unions. If a business needs to know *who* the product is for in order to decide whether or not to sell it, the business is discriminating on the basis of identity, not making a decision about any "message" inherent in the product itself. While the bakeries that turned down Mr. Jack refused to sell him a product *they would not have sold to anyone*, the Bakery here refused to sell Mr. Mullins and Mr. Craig a cake that it *would have sold to any heterosexual couple*. That is discrimination on the basis of a protected characteristic, regardless of whether the Bakery seeks to express or refrain from expressing any message, and therefore the application of the Anti-Discrimination Act to this conduct is not viewpoint-based.

Because the Anti-Discrimination Act regulates conduct without regard to what it communicates, and has only an incidental effect on expression, it is

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[wedding] cake' for them," Pet. Br. 22 & n.3 (alteration in original), is unfounded. It is "undisputed" in the record that the Bakery "categorically refused to bake a cake for [Mr. Mullins and Mr. Craig] without any idea of what [they] wanted that cake to look like," refusing to sell them even a "nondescript cake." Pet. App. 75a & n.7; *see also* Pet. Br. 21 (Mr. Phillips "immediately knew that *any* wedding cake he would design for them would express messages about their union that he could not in good conscience communicate" (emphasis added)). That the couple, after being subjected to discrimination, ultimately chose a four-tiered cake that when cut revealed rainbow-colored cake layers in one tier, JA 175-76, does not speak to what they originally would have sought before the ordeal.

subject, at most, to *O'Brien* scrutiny. As shown below in § II.C, the Anti-Discrimination Act easily survives that scrutiny.

B. Any "Compelled Expression" Is Incidental to the Anti-Discrimination Act's Regulation of the Conduct of Sales and Does Not Alter the First Amendment Analysis.

The Bakery's objection that the Anti-Discrimination Act compels it to express a message with which it disagrees does not alter the constitutional analysis or result. The doctrine governing compelled speech is the mirror image of the doctrine governing prohibitions of speech. Where a law regulates commercial conduct without regard to what it expresses, and requires expression only as an incident to that regulation, the law is valid for the same reasons that a law that incidentally prohibits expression is valid. As shown above in § II.A, the Anti-Discrimination Act is a neutral regulation of commercial conduct. It requires no state-mandated messages from Colorado businesses. It merely imposes a generally applicable prohibition against discrimination in sales on the basis of certain personal characteristics of the customers.

Just as it would not impermissibly "compel speech" for a state to require a photography studio that offers corporate headshots to the public at large to provide the same portraits for female employees that it provides for male employees, so, too, Colorado does not impermissibly "compel speech" by requiring the Bakery to treat same-sex and different-sex couples on equal terms. That is true even if the

incidental effect of the law is to require a photography studio whose owner believes that women should not work outside the home to photograph a female employee. Because the Anti-Discrimination Act targets conduct, not speech, any incidental effect it has on expression, whether prohibitory or compulsory, is permissible.

The Bakery's "compelled speech" argument primarily rests on *Hurley*, Pet. Br. 25-28, but its reliance is misplaced. *Hurley* involved a "peculiar application" of a public accommodation law, not to a commercial business, but to a privately organized St. Patrick's Day parade that the Court emphasized was "inherent[ly] expressive[]." 515 U.S. at 568, 572. A state court required the parade organizers to allow the Irish-American Gay, Lesbian and Bisexual Group of Boston to march "as its own parade unit carrying its own banner." *Id.* at 572. The Court found this application to be impermissible because, instead of regulating conduct with only an incidental effect on expression, it directly regulated nothing *but* expression—the content of the private parade sponsor's speech itself. *Id.* at 573 ("[T]he state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation."). The Court reasoned that because "every participating unit" of a parade "affects the message conveyed by the private organizers, the state courts' application of the [public accommodation law] produced an order essentially requiring petitioners *to alter the expressive content of their parade*." *Id.* at 572-73 (emphasis added). Thus, in *Hurley*, the public accommodation law was applied to change the message of a purely expressive, noncommercial association.

Here, the Bakery is not a private expressive association, but a commercial establishment that sells goods to the general public. The Court in *Hurley* itself distinguished the standard application of public accommodation laws to commercial businesses. 515 U.S. at 578 (anti-discrimination laws properly protect "any member of the public wanting a meal at the inn"). The Anti-Discrimination Act simply requires the Bakery to sell to same-sex couples the very same products it sells to different-sex couples. It does not affect how the Bakery's cakes look or any inscription on them, but only to whom they may not be refused. If Mr. Phillips organized a private parade of "Bakers Against Same-Sex Weddings," Colorado could not require the parade to include a contingent of bakers who marched behind a banner supporting marriage equality. But if he chooses to operate a retail business open to the public, Colorado can require his shop not to discriminate in its sales based on customers' race, religion, sexual orientation, or other enumerated characteristic.

The Bakery also cites *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Pet. Br. 26. *Dale* was a compelled association case, and the Bakery has advanced no compelled association claim here. Nor could it. In *Dale*, New Jersey applied its public accommodation law not to a business, but to the Boy Scouts, a private nonprofit organization. As applied, the law required the Boy Scouts to admit a "gay rights activist" as an assistant scoutmaster, even though the organization opposed "homosexual conduct." *Id.* at 644, 649-50. The Court concluded that application of the law violated the Boy Scouts' right of expressive association, because at its core, the right of association includes the right to choose

leaders who share the association's ideological commitments, which Mr. Dale did not. *Id.* at 650-51. If Mr. Phillips formed a private cake-baking club whose mission was to advance the tenets of Christianity, *Dale* would bar Colorado from requiring the club to accept non-Christians as leaders. But while a private ideological association certainly has a First Amendment right to exclude leaders who would undermine its chosen teachings, a business open to the public has no concomitant right to select its customers. *See Roberts*, 468 U.S. at 634 (O'Connor, J., concurring). Accordingly, *Dale*, like *Hurley*, expressly reaffirms the validity of public accommodation laws when applied to "clearly commercial entities" like the Bakery. *Dale*, 530 U.S. at 657 (citing as examples "restaurants, bars, and hotels").

The Bakery's reliance on other compelled speech cases is equally unavailing. *Wooley* and *Barnette* involved laws requiring citizens to express a specific, state-selected message: a law that required motorists to display the state motto "Live Free or Die" on their license plates, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), and a law requiring schoolchildren to recite the Pledge of Allegiance. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 628-29 (1943). The Anti-Discrimination Act does not require Coloradans to "personally speak the government's message." *FAIR*, 547 U.S. at 63. It does not require businesses to speak or express a specific, state-chosen message at all. It requires only equal treatment of customers.

In two other cases, the Court struck down content-based laws that required businesses to publish particular messages of others with whom

they disagreed. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, a right-of-reply statute required newspapers that published articles attacking the character of a political candidate to afford the candidate free space for a written reply in the newspaper itself. And in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), a state agency ordered a utility company to include in its billing envelope the newsletter of an environmental group with which the utility disagreed. In both instances, the state regulation favored opposing speech in a content-based way: The right of reply was triggered by the entity's speech, and the regulation imposed a content-based penalty. Here, the Anti-Discrimination Act has merely told all Colorado businesses open to the public that whatever goods and services they offer to heterosexual couples they must also offer to lesbian and gay customers and vice versa. Any effect on speech is entirely incidental.

Even where, unlike here, a law requires entities to speak particular words or to provide access for third-party speakers, the Court has rejected First Amendment challenges where the law regulates conduct and any compulsion to speak is incidental. In *FAIR*, for example, the Court rejected a First Amendment challenge to the Solomon Amendment, which required law schools to provide equal access both to military and non-military recruiters on campus. 547 U.S. at 54. At the time, the military forbade lesbian, gay, and bisexual people from serving openly. *Id.* at 52 & n.1. A coalition of law schools argued that, by requiring that they provide military recruiters access to speak with students on campus, and by requiring the law schools

to carry the military's messages, the Solomon Amendment compelled the schools to endorse the military recruiters' message of discrimination. *Id.* at 52-53. The schools specifically objected that they would be required to engage in speech by sending e-mail messages and posting notices on a bulletin board on behalf of the military. *Id.* at 61-62.

This Court rejected the law schools' claim, reasoning that "[a]s a general matter the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60. The Court distinguished *Wooley* and *Barnette* on the ground that the Solomon Amendment "does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto . . . ." *Id.* at 62. Rather, it found, "[t]he compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct." *Id.*

The Court similarly rejected the argument that, by granting equal access, the schools were impermissibly compelled to carry the military's message. It found that the Solomon Amendment's requirement was not only content-neutral, but permitted the law schools to make clear that they did not endorse the military's discriminatory hiring policy by complying with federal law. *Id.* at 64-65. The Court cited *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), in which the California Supreme Court had required a privately owned shopping center to allow people to hand out leaflets on its property. The shopping center's owner argued

that the California court's order violated the compelled speech doctrine. *Id.* at 85-88. The Court disagreed, noting that: (1) the shopping center was "by choice of its owner . . . a business establishment that is open to the public"; (2) "[t]he views expressed by members of the public in passing out pamphlets" were not likely to be identified with the shopping center; (3) the State did not mandate a "specific message" to be displayed on the shopping center's property; and (4) the shopping center was free to dissociate itself from any message by "disclaim[ing] any sponsorship of the message and . . . explain[ing] that the persons are communicating their own messages by virtue of state law." *Id.* at 87.

The Court has applied this test only where a state law has required an entity to grant third parties access to its property for their speech. Here, unlike in *FAIR* and *PruneYard*, the Bakery is not required "to use [its] property as a forum for the speech of others." *Id.* at 85. It is simply being compelled not to refuse a sale on the basis of a customer's identity. Thus, the Court need not apply the *PruneYard* factors. But even if it were to do so, they, too, support the decision below.

First, like the shopping center in *PruneYard*, Mr. Phillips's business is open to any member of the public who walks through the door.

Second, the Bakery's provision of a wedding cake to a customer is not likely to be perceived as the Bakery's endorsement of that customer's wedding or marriage, precisely because the Bakery offers its products to the public at large. Where goods and services are made publicly available, their sale to any particular customer does not communicate anything,

and the customer's subsequent use of the product to express any message of her own will not be attributed to the seller. That is why an attendee at a birthday party does not think that the bakery that provided the cake is itself wishing the birthday girl a "Happy Birthday." Nor does anyone at a wedding understand the cake to be expressing the bakery's endorsement of the marriage. As a florist who refused to provide flowers for a same-sex couple's wedding acknowledged at her deposition, "providing flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism." *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 557 (Wash. 2017), *petition for cert. filed*, No. 17-108 (U.S. July 14, 2017).[4]

Third, the Anti-Discrimination Act does not dictate any specific, state-chosen message or speaker.

And, fourth, the Bakery is free to post a notice saying that it does not support or endorse customer events for which it provides baked goods. *See FAIR*, 547 U.S. at 65. In addition, Mr. Phillips himself is free to express his own views about marriage for same-sex couples, as he has done. *See, e.g.*, *The View:*

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[4] The United States argues that "[a] reasonable observer who views a custom wedding cake could fairly infer that its creator at least does not oppose his clients' marriage, just as a reasonable observer of a statue memorializing a military victory could fairly infer that its sculptor at least was not a pacifist." U.S. Br. 26. The analogy is inapt, however. A sculptor presumably does not create public sculptures for any and all members of the public who walk in the door. Selectively competing to create a public sculpture is not equivalent to opening a business to the public at large and would not render a sculptor subject to the Anti-Discrimination Act.

Baker Jack Phillips on Religious Discrimination Case (ABC television broadcast June 30, 2017), https://goo.gl/ocMUVo, https://goo.gl/ew3tQy.

Accordingly, because any compelled expression here is entirely incidental to the content-neutral regulation of commercial conduct, the Anti-Discrimination Act's application is plainly valid, and triggers, at most, *O'Brien* scrutiny.[5]

C. The Anti-Discrimination Act Satisfies *O'Brien* Scrutiny and Would Satisfy Even Strict Scrutiny.

As shown above in § II.A, the Anti-Discrimination Act regulates commercial conduct in a content-neutral manner with only an incidental effect on speech. The law's purpose—guaranteeing equal treatment by businesses open to the public—is

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[5] The Bakery refused to make any wedding cake, regardless of whether the cake was to be decorated with words. Yet *FAIR* illustrates that the result would not be different if a cake with the words "Congratulations on Your Wedding" were at issue. As discussed in the text, the Court in *FAIR* upheld an equal access requirement that incidentally required law schools to communicate certain words in e-mails and on fliers on behalf of the military if they would communicate the same messages on behalf of other employers. 547 U.S. at 62. Similarly, here, the Anti-Discrimination Act's equal treatment requirement means that a bakery may not refuse to decorate a cake with the words "Happy Birthday" for an African-American family if it would make a cake bearing the same inscription for a white family. The Anti-Discrimination Act requires retail bakeries to provide a congratulatory message on a wedding cake only to the extent that it would provide the same message to similarly situated customers without regard to sexual orientation (or race or religion), and only as an incident to the requirement of equal treatment. It does not require the Bakery to offer cakes bearing particular words, or for that matter, any cakes bearing words at all, so long as it treats its customers equally.

"unrelated to the suppression of expression." It therefore, at most, triggers *O'Brien* scrutiny. Neither the Bakery nor the United States contends that it fails such scrutiny, and for good reason. Under *O'Brien*, a law need further only "'a substantial government interest that would be achieved less effectively absent the regulation.'" *FAIR*, 547 U.S. at 67 (quoting *Albertini*, 472 U.S. at 689). Application of the Anti-Discrimination Act here easily satisfies that standard. Indeed, even if strict scrutiny applied, application of the law would be constitutional.

1. The State has a substantial interest in eradicating discrimination in public life.

The State has a substantial, indeed compelling, interest in fostering full inclusion in civic life by guaranteeing equal access to businesses open to the public, an essential component of equal participation in a free society. *See Romer*, 517 U.S. at 631; *Duarte*, 481 U.S. at 549. Anti-discrimination laws ensure "society the benefits of wide participation in political, economic and cultural life." *Roberts*, 468 U.S. at 625; *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014); *see generally* Br. of Cty. of Santa Clara et al. as Amici Curiae in Supp. of Resp'ts § I.

This Court has recognized repeatedly that the government has a compelling interest in "eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services." *Roberts*, 468 U.S. at 623-24; *see also id.* at 628 (discrimination "cause[s] unique evils that government has a compelling interest to prevent"); *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 n.5 (1988)

(recognizing the "State's 'compelling interest' in combating invidious discrimination"); *Duarte*, 481 U.S. at 549; *Bob Jones Univ.*, 461 U.S. at 604.

Public accommodation laws protect "the State's citizenry from a number of serious social and personal harms." *Roberts*, 468 U.S. at 625. Being turned away from public accommodations like restaurants, doctor's offices, and retail bakeries because of one's identity "deprives persons of their individual dignity." *Id.* The Anti-Discrimination Act thus seeks to "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel*, 379 U.S. at 250 (internal quotation marks omitted); *see also Runyon*, 427 U.S. at 179 (anti-discrimination laws "'guarantee that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man'" (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968))); *see generally* Br. of Amici Curiae Servs. & Advocacy for Gay, Lesbian, Bisexual & Transgender Elders et al. § II (describing discrimination LGBT older adults face in seeking access to public accommodations).

The Bakery's contention that the government's interest in enforcing the Anti-Discrimination Act can be reduced to access to custom cakes for wedding receptions, Pet. Br. 50, is absurd. "This case is no more about access to [cakes] than civil rights cases in the 1960s were about access to sandwiches." *Arlene's Flowers*, 389 P.3d at 851; *see also Piggie Park*, 256 F. Supp. at 945 (restaurant's refusal to serve African Americans was unlawful despite the fact that those customers could eat at another restaurant). The harm of being refused service because of one's identity is not erased by obtaining a good elsewhere.

"The government views acts of discrimination as independent social evils even if the prospective [customers] ultimately find" the goods or services they sought. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994); *see also Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring) ("Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . . ." (internal quotation marks omitted)). Every such rejection is an "assertion of [gay couples'] inferiority" that "denigrates the dignity of the excluded" customer and "reinvokes a history of exclusion." *Cf. J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (internal quotation marks omitted).

The Bakery also contends that applying the Anti-Discrimination Act in this case harms Mr. Phillips' dignity by "brand[ing] as discriminatory Phillips's core religious beliefs" and "compel[ling] him to stop creating his wedding designs." Pet. Br. 52, 55-56. That Mr. Phillips's sincerely held religious beliefs are in tension with an anti-discrimination law that governs his business undoubtedly creates difficulty as he seeks to live his life in accordance with his faith. That is the case whenever people hold religious objections to complying with anti-discrimination laws or any other generally applicable business regulations. *See Bob Jones Univ.*, 461 U.S. 574 (religious objection to racial integration); *Piggie Park*, 390 U.S. at 402 n.5 (same); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (religious belief that only a man could be the "head of household"); *cf. United States v. Lee*, 455 U.S. 252,

261 (1982) (religious opposition to paying Social Security taxes). But that does not negate in any way the State's substantial, indeed compelling, interest in eradicating discrimination and furthering equal treatment in the commercial marketplace.

The United States' insinuation, U.S. Br. 32, that it "may" be permissible for the states to override religiously motivated discrimination where it is based on race, but not where it is based on other factors, is unfounded. While the state interest in eliminating race discrimination is compelling, that does not mean Colorado lacks a compelling interest in eradicating other forms of invidious discrimination.

The United States' suggestion that Colorado's interest in prohibiting sexual orientation discrimination by private parties is not compelling because this Court has not said whether sexual orientation discrimination by the government triggers strict scrutiny under the Equal Protection Clause, *id.*, is equally wrong. States have a compelling interest in eradicating class-based discrimination where it exists. *See Roberts*, 468 U.S. at 626 (compelling interest in eradicating discrimination based on sex); *see also Lumpkin v. Brown*, 109 F.3d 1498, 1501 (9th Cir. 1997) (compelling interest in eradicating discrimination based on sexual orientation). This Court has declined to apply strict scrutiny to classifications based on sex, *United States v. Virginia*, 518 U.S. 515, 532-33 (1996), disability, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985), and age, *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976), but state and federal governments have a compelling interest in prohibiting discrimination on

these bases. *See, e.g.*, *Duarte*, 481 U.S. at 549 (state has "compelling interest in eliminating discrimination against women"); *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987) (Rehabilitation Act of 1973 was aimed at overcoming employers' prejudice against people with disabilities).

Moreover, this Court has recognized our Nation's painful history of discrimination against LGBT people, who have long been denied equal opportunity to participate in civic life and enjoy basic human dignity. *See Obergefell*, 135 S. Ct. at 2596. In Colorado, that history of discrimination includes the adoption of Amendment 2, the law struck down in *Romer* as "inexplicable by anything but animus toward the class it affects"—lesbian and gay people. 517 U.S. at 632. It is against this backdrop that the Colorado legislature chose to add sexual orientation to the personal characteristics protected by the Anti-Discrimination Act.

The State's interest in preventing discrimination against LGBT people need only be substantial to satisfy *O'Brien*. But because it is compelling, it would satisfy even strict scrutiny.

2. Recognizing the Bakery's proposed exemption from the Anti-Discrimination Act would further the State's interest less effectively than uniform enforcement.

To satisfy the second prong of *O'Brien* review, the State need only show that recognizing the asserted First Amendment exemption would "less effectively" further the State's substantial interest. *FAIR*, 547 U.S. at 67. Neutral regulations of

expressive conduct are not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689.

That standard is easily met here: A state's interest in prohibiting discrimination by places of public accommodation would be achieved less effectively by a law permitting discrimination by businesses that object to equal treatment. Moreover, because the most carefully tailored way to ensure equal treatment is to prohibit discrimination, the Anti-Discrimination Act not only achieves the State's interest in an effective manner, as *O'Brien* requires, but is "precisely tailored" to achieve its interest, and therefore would satisfy even strict scrutiny's narrow tailoring requirement. *See Burwell*, 134 S. Ct. at 2783.

Allowing businesses to discriminate whenever they deal in expressive goods or services or can articulate a religious or ideological objection to what compliance with an anti-discrimination law "communicates" would directly undermine the government's interest: to guarantee equal treatment to all.

Barring discrimination against LGBT people except when they seek goods or services for their weddings, even if the exception could be so cabined (which it cannot, as shown below in § II.D), would also "less effectively" further the government's interest. *See FAIR*, 547 U.S. at 67. Marrying a person of the same sex is so "closely correlated" to the status of being gay that no distinction can be drawn between the two. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010); *Lawrence v.*

Texas, 539 U.S. 558, 583 (2003); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Discrimination against gay people who marry is thus discrimination "directed toward gay persons as a class," *Lawrence*, 539 U.S. at 583, and cannot be squared with the Constitution's guarantee of "equal dignity." *See Obergefell*, 135 S. Ct. at 2608.

A sign proclaiming "Wedding Cakes for Heterosexuals Only" would be no less pernicious than one reading "Heterosexuals Only." *Cf. Elane Photography*, 309 P.3d at 62-63. There is nothing equal about offering a limited menu or second-class service based on a customer's protected characteristic, as the Colorado Supreme Court recognized in 1934. In *Crosswaith v. Bergin*, 35 P.2d 848, 848 (Colo. 1934), a Denver restaurant refused to serve an African-American customer at a table with his white companions and offered to seat him in the kitchen instead. The restaurant contended that it had not violated the public accommodation law because it offered to feed Mr. Crosswaith. The court disagreed, concluding that the refusal to serve Mr. Crosswaith on an equal basis with white customers "was undoubtedly the kind of discrimination against which the law is obviously aimed." *Id.*; *see also Elane Photography*, 309 P.3d at 62 ("[I]f a restaurant offers a full menu to male customers, it may not refuse to sell entrees to women, even if it will serve them appetizers.").

The Bakery contends that an acceptable alternative to uniform enforcement of the Anti-Discrimination Act would be for the Commission to create or encourage "websites apprising consumers of professionals in a geographical area who will

celebrate same-sex weddings." Pet. Br. 61. Essentially, the Bakery suggests that the State should not only tolerate, but affirmatively participate in, websites telling disfavored minority groups where they can and cannot shop. Pet. App. 50a. The degradation that accompanies being refused service and the balkanization of markets would be exacerbated, not ameliorated, if the State were to participate.

The Bakery also argues that the Anti-Discrimination Act is not narrowly tailored because (1) it permits speech and conduct that, it says, would be more hurtful than the refusal of service that Mr. Mullins and Mr. Craig experienced by leaving "the citizenry at large free to express various reasons why" they oppose marriage for same-sex couples; and (2) it exempts religious institutions. Pet. Br. 57. But there is no contradiction between prohibiting discrimination in sales by businesses open to the public and allowing private citizens to speak their minds or accommodating religious institutions' exercise of religion. The Anti-Discrimination Act does not seek to prevent people from hearing opposing views that may feel hurtful or cause offense; it seeks to protect them from being denied equal service by businesses open to the public.

Similarly, the Bakery's claim that the Anti-Discrimination Act is not narrowly tailored because Title II of the Civil Rights Act of 1964 does not reach retail bakeries, Pet. Br. 59; U.S. Br. 22-23, cannot be taken seriously. Title II does not set the limit of anti-discrimination law or narrow tailoring. *See Roberts*, 468 U.S. at 626.

Because it is narrowly tailored to serve a compelling interest in eradicating discrimination in the commercial market, the Anti-Discrimination Act not only satisfies *O'Brien* scrutiny, but would also satisfy strict scrutiny.

D. The Bakery's and the United States' Requested Exceptions Are Unsupported and Unworkable.

As shown above in §§ II.A and II.B, there is no support in case law for a First Amendment exemption to a content-neutral anti-discrimination law applied to commercial sales. So the Bakery and the United States seek to invent one out of whole cloth. The exemptions they advance are contrary to precedent, would mire the courts in impossible and unprincipled line-drawing, and would leave the public uncertain about which businesses are legally entitled to refuse them service based on protected characteristics. Indeed, an exemption for "expressive" businesses based on the Free Speech Clause would be even "more destructive" than any exemption rooted in the Free Exercise Clause, because it would not be limited to objections motivated by religious beliefs, but would apply to objections motivated by any reason at all. *Cf. Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 171 (2002) (Scalia, J., concurring).

The Bakery argues for an exception for any business when it offers "expressive," "custom" products. Pet. Br. 58. The United States, for its part, argues that an exception should be made only when a business provides made-to-order "expressive" goods and "participat[es] in an expressive event." U.S. Br. 8, 14.

Neither proposed exception even encompasses the facts of this case. As the record demonstrates, this is not actually a case about "custom" wedding cakes or, indeed, "wedding cakes" at all. The Bakery refused to make *any* cake for Mr. Mullins and Mr. Craig's wedding reception, even a "nondescript" one. Pet. App. 75a. And it has refused to sell *any* baked goods for celebrations of a same-sex couple, even cupcakes for a lesbian couple's commitment ceremony. JA 73, 82, 113-14. Nor did Mr. Mullins and Mr. Craig ask the Bakery to "participate" in their wedding ceremony. The couple's wedding ceremony took place in Massachusetts, and they sought to purchase a cake for a different event (a reception), in a different state (Colorado), on a different day. *See, e.g.*, JA 43.

The proposed exceptions also fail as a matter of law. First, none of the limitations finds support in precedent. As demonstrated above in § II.B, there is nothing in *Hurley* or the compelled speech doctrine to suggest a proposed distinction between a jewelry store, which, according to the United States, may not be required to produce wedding rings for a same-sex couple, U.S. Br. 19, 27, and a banquet hall, which, according to the United States, may be required to host the wedding of a same-sex couple. U.S. Br. 21-22. And neither the Bakery nor the United States explains why the sale of a custom or made-to-order product gets First Amendment protection, while the sale of an identical product made in advance does not, particularly when it is the customer's use of the product to which the business objects. *Hurley* and this Court's other public accommodation and commercial conduct cases demonstrate where the line is drawn: between regulations that govern the

commercial conduct of businesses open to the public and regulations that target the content of speech and association of private, nonprofit expressive groups. This case falls on the former side.

In addition, nothing about the Bakery's or the United States' proposed exceptions are limited to retail bakeries or weddings. Countless other businesses open to the public provide customized goods and services that are "artistic" or "expressive," including landscape architects, tailor shops, hair and nail salons, florists, clothing designers, makeup artists, and architecture firms. Do they all have a First Amendment privilege to hang signs in their storefronts saying, "We serve whites (or men or Christians or heterosexuals) only"? Under the Bakery's proposed exception, could an architecture firm refuse to work with a Latino family on a home remodel if it objected to sending a message of equal citizenship for Latino people? Could a florist refuse to provide an arrangement for a gay person's funeral if it objected to commemorating LGBT lives? *But see, e.g.*, *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 429 (4th Cir. 2006) (hair salon violated civil rights law by refusing to "do black people's hair").[6]

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[6] These concerns are not hypothetical. Many kinds of businesses have asserted a First Amendment right to discriminate against LGBT people, advancing arguments similar to the Bakery's. For example, a wedding venue open to the public objected to the application of New York's Human Rights Law to its refusal to rent to a lesbian couple, arguing that, by hosting the couple's ceremony, the venue "would effectively be communicating and endorsing messages about marriage that are antithetical to [the owners'] religious views on the issue." *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 431 (App. Div. 2016). Similar challenges to laws requiring equal treatment of LGBT people have been raised by businesses that provide goods or services related to weddings,

As for the United States' proposed limitation to "participation in an expressive event," U.S. Br. 14, many events beyond wedding receptions are expressive. Funerals, baby showers, confirmations, bar and bat mitzvahs, birthday parties, quinceañeras, anniversaries, and graduations are all "expressive events." Could a hair salon refuse to style the hair of a girl born in Mexico for her quinceañera because it opposed Mexican immigration and did not want to celebrate a Mexican family's culture? Could a tailor shop refuse to alter a suit for a boy's confirmation because it opposed the Catholic Church's teachings?

And the United States' conception of "participation" is all-encompassing. It characterizes a jeweler as participating in the wedding merely

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including a videography business, *Telescope Media Grp. v. Lindsey*, No. 0:16-cv-04094, 2017 WL 4179899 (D. Minn. Sept. 20, 2017), *notice of appeal filed* (8th Cir. Oct. 20, 2017), a stationery store, *Brush & Nib Studio, LC v. City of Phoenix*, No. CV2016-052251 (Ariz. Super. Ct., Maricopa Cty. Sept. 16, 2016), https://perma.cc/8P9Z-FW6J, *appeal docketed*, No. 1 CA-CV 16-0602 (Ariz. Ct. App. Sept. 21, 2016), and a florist, *Arlene's Flowers*, 389 P.3d 543, as well as by businesses that have nothing to do with weddings, such as a barber shop, Defs.' Answer at 2, *Oliver v. Barbershop, R.C., Inc.*, No. CIV-DS1608233 (Cal. Super. Ct., San Bernardino Cty. Jan. 19, 2017), http://perma.cc/S4ZV-VPYK, a funeral home, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016), *appeal docketed*, No. 16-2424 (6th Cir. Oct. 13, 2016), a bed and breakfast, Mem. in Supp. Def.'s Summ. J. Mot. at 15-18, *Cervelli v. Aloha Bed & Breakfast*, No. 1-CC-111003103 (Haw. Cir. Ct., 1st Cir. Apr. 15, 2013), http://perma.cc/JA63-M8J5, *appeal docketed*, No. 13-806 (Haw. Ct. App. May 16, 2013), and a medical clinic, *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court*, 189 P.3d 959 (Cal. 2008).

because the couple exchanges rings made by the jeweler, even if the rings were made weeks in advance and the jeweler is nowhere to be seen. Likewise, bakers are deemed to "participate" virtually in weddings merely by providing products for the event. If that is sufficient "participation," then anyone who provides any good or service for an expressive event qualifies.

Both the Bakery's and the United States' proposals would put courts in the untenable position of having to adjudicate, on a case-by-case basis, the expressiveness of particular businesses, lines of products, and customers' events. They offer no standards that courts might apply to this unenviable task. And they fail to explain why the Bakery's sale of a cake for Mr. Mullins and Mr. Craig's wedding reception should fall on one side of the line, and its sale of a cake for the wedding reception of an interracial or interfaith couple (or an African-American or Jewish couple) should fall on the other.

If these lines are elusive for the courts, they will be even more so for consumers—particularly members of minority communities with a history of experiencing discrimination—who would be left to wonder which businesses they should be concerned about visiting for fear that they will be turned away. *See generally* Br. for Denver Metro Chamber of Commerce as Amicus Curiae § I.B.

Finally, the entire inquiry as to whether a particular good, service, or event is "expressive" rings hollow when all discrimination can itself be characterized as expressing a particular message by the party discriminating. From the vantage point of a restaurant owner who believes that racial

integration transgresses God's law, serving an African-American customer alongside a white customer sends a message of equal citizenship at least as strongly as selling a cake for the wedding reception of a same-sex couple. *See, e.g.*, *Piggie Park*, 390 U.S. at 402 n.5.

In sum, the freedom of speech provides businesses no right to discriminate in commercial sales, regardless of whether the business's product might be "expressive" or could be used in an event that might also be "expressive."

III. THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE DOES NOT PERMIT A BUSINESS TO ENGAGE IN DISCRIMINATION PROHIBITED BY A NEUTRAL AND GENERALLY APPLICABLE LAW.

As this Court explained in *Employment Division v. Smith*, 494 U.S. 872 (1990), "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting *Lee*, 455 U.S. at 263 n.3).

A law that is neutral and generally applicable is constitutionally permissible if it is rationally related to a legitimate government interest. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). The Bakery contends that the Commission's application of the Anti-Discrimination Act is not neutral or generally applicable, largely recycling its arguments for why the Anti-Discrimination Act is not content- or

viewpoint-neutral. The Bakery is wrong on both fronts. In any event, as explained above in § II.C, the Anti-Discrimination Act survives even the most searching form of judicial review.[7]

A. The Anti-Discrimination Act Is Neutral on Its Face and as Applied.

The Anti-Discrimination Act is neutral on its face, and the Bakery does not contend otherwise. Nor could it. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533. The Anti-Discrimination Act does not target any religion.

The Bakery instead argues that the application of the Anti-Discrimination Act here was not neutral, mostly relying on the same arguments it makes for why the law discriminates based on content and viewpoint. Pet. Br. 39-44. Those arguments are addressed above in § II.A.3, and only a few additional points warrant mention here.

The Bakery again focuses on the Division's finding of no probable cause in three discrimination claims lodged by William Jack against bakeries that refused to make cakes with derogatory messages. This time, the Bakery asserts that those findings support its contention that the Division has not neutrally applied the Anti-Discrimination Act. The Bakery notes that in those investigations, the Division concluded that the other bakeries refused

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[7] For this reason, this case is not a good vehicle to reconsider the rule announced in *Smith*, which the Bakery half-heartedly—and without offering any reasoned justification—suggests in a footnote. Pet. Br. 48 n.8.

Mr. Jack's requests not because of his religion, but because they included messages the bakeries did not want to inscribe, whereas the Division concluded that the Bakery refused Mr. Mullins and Mr. Craig because of their identity and not because of the message the Bakery wanted to avoid. Pet. Br. 41.

As discussed in more detail above, § II.A.3, the Division did not favor secular beliefs over religious beliefs through these determinations. It simply found that the Bakery engaged in discrimination based on a proscribed characteristic of its customers, while the bakeries Mr. Jack approached did not.[8] That does not render the Division's application of the Anti-Discrimination Act non-neutral as to religion. Thus, there is no unequal application of the Anti-Discrimination Act that "affords broader protection to LGBT consumers than to people of faith." Pet. Br. 41; *cf. Bob Jones Univ.*, 461 U.S. at 604 n.30 (IRS policy barring racial discrimination does not "prefer[] religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden").

In any event, LGBT people do not receive preferred status under the Anti-Discrimination Act; they receive equal treatment. A business open to the public does not have to offer any particular good or

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[8] Contrary to the Bakery's suggestion, Mr. Jack's anti-gay views—e.g., deeming gay conduct to be "detestable"—are not "closely associated" with any particular religion. Pet. Br. 45. In any event, the fact that anti-gay views happen to be a part of Mr. Jack's religious beliefs does not make the bakeries' refusal to make cakes expressing those views discrimination "because of" Mr. Jack's religion. Many people of all religions support equal treatment for LGBT people, and others, of all religions, oppose it.

service for the weddings of same-sex couples that it would not sell to anyone else. The Anti-Discrimination Act is therefore neutral as to religion both on its face and as applied.

B. The Anti-Discrimination Act Is Generally Applicable.

In determining whether a law is generally applicable, this Court has looked at whether the government enforces it "in a selective manner" to "impose burdens only on conduct motivated by religious belief" and not on similar conduct motivated by other reasons. *See Lukumi*, 508 U.S. at 543.

The Anti-Discrimination Act is generally applicable because it applies across the board to all businesses open to the public, regardless of the religious commitments of their owners, and it regulates sales to the public, a secular activity. Unlike *Lukumi*, where "almost the only conduct subject to [the challenged ordinances was] the religious exercise of Santeria church members," *id.* at 535, the Anti-Discrimination Act applies to all places of public accommodation doing business in the State, without regard to religion.

The Anti-Discrimination Act also is generally applicable because the Commission does not apply it only to religiously motivated discrimination, while permitting the same conduct when engaged in for non-religious reasons. That the Bakery happens to have violated the Anti-Discrimination Act because of its owner's religious beliefs does not mean that the law targets religion. Pet. Br. 45. On that view, Title II and Title VII would unconstitutionally target religion if a hotel owner or employer discriminated on the basis of race out of a sincerely held religious

conviction. *But see Bob Jones Univ.*, 461 U.S. at 603-04; *Piggie Park*, 390 U.S. at 402 n.5. To the contrary, the Anti-Discrimination Act is indifferent as to why a business discriminates on the basis of any protected characteristic.

That the Anti-Discrimination Act exempts churches, synagogues, mosques, and other places principally used for religious purposes, *see* Colo. Rev. Stat. § 24-34-601(1); Pet. Br. 45 n.7, 57, does not undermine the law's general applicability under *Smith*. Exemptions for religious organizations aimed at accommodating religious freedom do not violate the free exercise clause. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). And the Anti-Discrimination Act bears no resemblance to the religious gerrymandering in *Lukumi*, where the law against animal slaughter was so full of exceptions that as a practical matter it applied only to ritual slaughter by members of the Santeria religion. 508 U.S. at 535-36.

The Bakery's theory that the Anti-Discrimination Act is underinclusive because it is not implicated when a business turns down a job for reasons other than a customer's protected characteristic, Pet. Br. 44-45, misunderstands the inquiry. There is no requirement that a law regulate every possible form of discrimination in order to constitutionally regulate some. For the same reasons, the Bakery's claim that the Anti-Discrimination Act does not survive strict scrutiny because it aims to prevent harms to consumers (when they are victims of discrimination) but not businesses (when they seek to discriminate), Pet. Br. 44, misses the mark. The same could be said for all anti-discrimination laws, but that does not mean they all fail constitutional review.

C. That the Bakery Claims an Exemption Under Both the Free Speech and Free Exercise Clauses Does Not Change the Result.

The Bakery's free exercise claim fails under *Smith*. Its free speech claim fails because the Anti-Discrimination Act is a generally applicable regulation of business conduct that only incidentally affects expression. In a last-ditch effort, the Bakery contends that strict scrutiny should nonetheless apply because it asserts both a losing free exercise claim and a losing free speech claim. Pet. Br. 46. There is no support in law or logic for such a result.

Adopting the Bakery's "hybrid rights" theory would swallow *Smith*'s holding. *See Lukumi*, 508 U.S. at 567 (Souter, J., concurring). Given that many religious practices are infused with meaning and expression,[9] many free exercise claims could simultaneously be characterized as free speech claims. The petitioners in *Smith* could have pleaded a free speech claim by arguing that the peyote ritual was a way of expressing their deeply held religious beliefs. *See id.* Bob Jones University, too, could have asserted that its racially discriminatory admissions policy expressed its belief that the Bible forbids interracial dating and marriage and that adherence to the IRS's policy would require it to express a view with which it disagreed. *See Bob Jones Univ.*, 461 U.S. at 580.

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[9] *See Lukumi*, 508 U.S. at 525 (explaining the deep meaning of animal sacrifice to the Santeria religion); *Smith*, 494 U.S. at 874 (explaining that peyote was ingested "for sacramental purposes at a ceremony of the Native American Church").

In *Smith*, this Court distinguished several of its prior precedents as involving not only a free exercise claim but also another constitutional claim, suggesting that a challenge on other constitutional grounds might "be reinforced by Free Exercise Clause concerns." 494 U.S. at 881-82. But all of the cases distinguished by the Court in *Smith* involved other claims that independently prevailed. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. Town of McCormick*, 321 U.S. 573 (1944), which invalidated various licensing and taxation schemes for religious and charitable solicitation, each involved meritorious free speech or free press claims. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), rested only on due process, not free exercise, grounds,[10] as did *Meyer v. Nebraska*, 262 U.S. 390 (1923), which protected, under substantive due process principles, the liberty of parents to direct the upbringing and education of their children. And *Wisconsin v. Yoder*, 406 U.S. 205 (1972), involved only a free exercise claim. While the *Yoder* Court mentioned parental rights, it did not say that a failing free exercise claim could be buttressed by a failing substantive due process claim. The two other cases *Smith* distinguished as "decided exclusively upon free speech grounds" but "involv[ing] freedom of religion," 494 U.S. at 882—*Wooley* and *Barnette*—are perhaps the most paradigmatic examples of a viewpoint-based speech compulsion, to which strict scrutiny independently applies under the Free Speech Clause.

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[10] Indeed, the Court had not yet held that the Free Exercise Clause was incorporated against the states at the time *Pierce* was decided. *See Cantwell*, 310 U.S. at 303-04 (incorporating free exercise).

This Court has never applied *Smith*, or any of the precedents it discussed, to trigger strict scrutiny on "hybrid rights" grounds. Nor has this Court applied *Smith* to invalidate a neutral, generally applicable law where two constitutional claims were asserted and each, if taken alone, would fail.

In any event, for the reasons stated above in § II.C, the Anti-Discrimination Act satisfies even strict scrutiny. Long before *Smith*, this Court unanimously refused to enshrine in the Constitution a right to discriminate in ordinary economic affairs on free exercise grounds. *See Piggie Park*, 390 U.S. at 402 n.5. It should again refuse to do so today.

CONCLUSION

The Colorado Court of Appeals' decision affirming the Commission's order should be affirmed.

Respectfully Submitted,

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